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IN THE

# Supreme Court of The United States

No. 895

PAUL C. WETTER, et al.,

*Appellants,*

v.

CITY OF INDIANAPOLIS, et al.,

*Appellees.*

**ON APPEAL FROM THE SUPREME COURT OF INDIANA**

## JURISDICTIONAL STATEMENT

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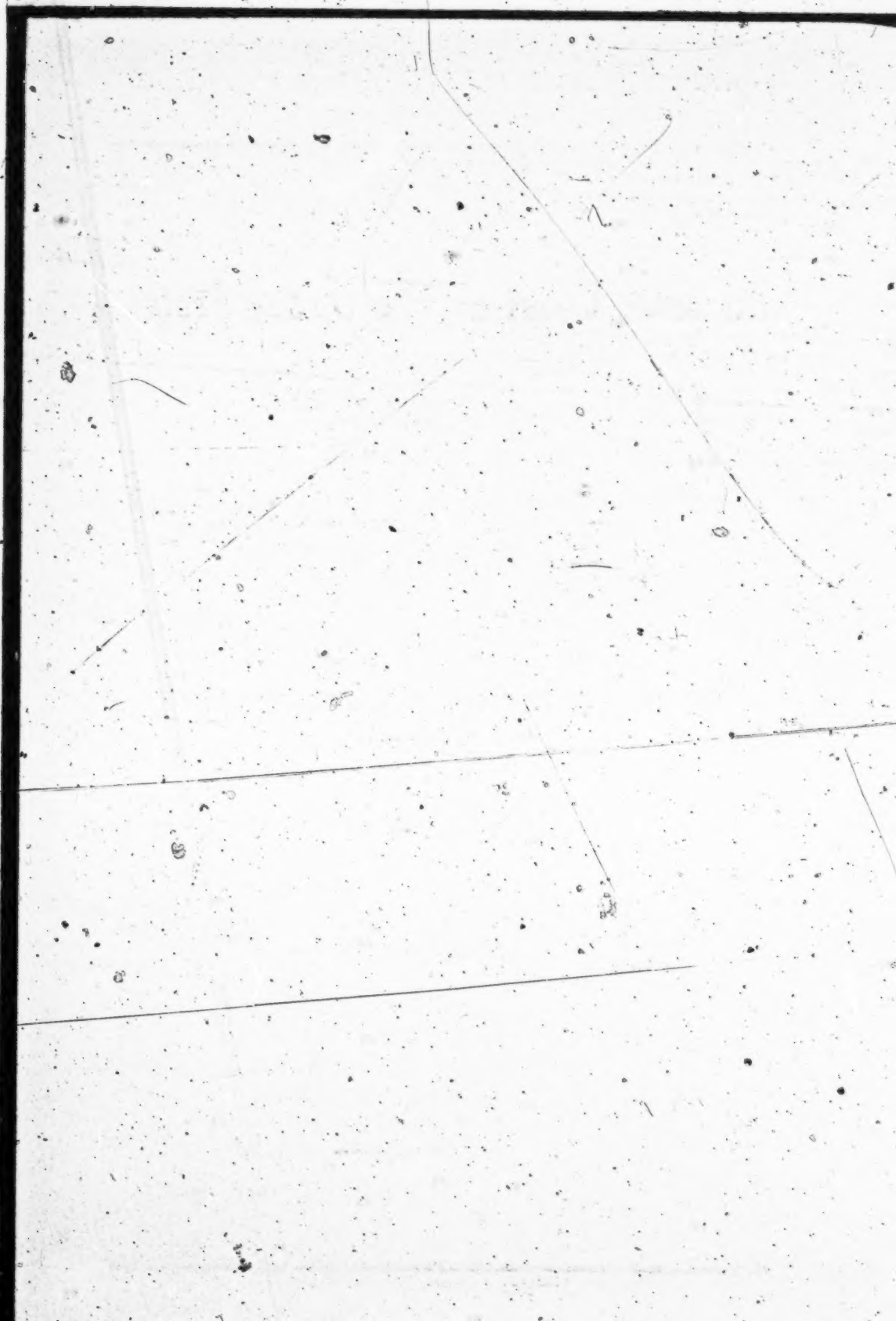

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IN THE

# Supreme Court of The United States

No. _____

OCTOBER TERM, 1967

PAUL C. WETTER, ALBERT STEFFEY, PETER A. CORSARO, DOROTHY POYNTER, VIRGINIA JAMES, suing herein as Taxpayers of the City of Indianapolis, Indiana, and as inhabitants and members of the general public herein affected; and also as class representatives of all other such persons similarly situated and affected herein; and
JOHN J. DILLON, as Attorney General of the State of Indiana,

*Appellants,*

vs.

CITY OF INDIANAPOLIS, INDIANA, a municipal corporation;
PHILLIP L. BAYT, as its mayor;
CHARLES H. BOSWELL, as its city controller;
DAVID M. SILVER, WILLIAM H. WARREN, and SHIRLEY D. MURPHY, as the Commissioners constituting its Board of Public Safety;
JACOB L. STEINMETZ, as the Superintendent of the City Market;
RUSSELL J. DEAN, HUGH G. BAKER, ROBERT E. SCHREIBER, AUGUST SEILOFF, as its Board of Public Works;
CHRISTIAN J. EMHARDT, JOSEPH E. BRIGHT, CHARLES W. APPLEGATE, MARY M. FRANCIS, R. THOMAS McGILL, GLADYS PHOLMAN, ROSCOE A. McKINNEY, JOSEPH C. WALLACE, WILLIAM H. WILLIAMSON, Comprising the Common Council of said City;
LUTHER J. SHIRLEY, DONALD JAMESON, WALTER J. DEAN, ALBERT O. DELUSE, BRUCE C. SAVAGE, as its Off-Street Parking Commission;
DARRELL C. WALTON, City Civil Engineer;
KENNETH K. WARK, its Commissioner of Buildings;
ALBERT H. LOSCHE, City Purchasing Agent;
And all other officers, employees and agents, acting herein for, or in behalf of said City, or of any of said co-defendants; and all successors to any thereof,

*Appellees.*

## ON APPEAL FROM THE SUPREME COURT OF INDIANA

## JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Indiana entered on the 11th day of September,

1967, denying Appellants' petition for rehearing and affirming the judgment of the trial court, and submit this statement to show that The Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

## OPINION BELOW

The Opinion of the Supreme Court of Indiana denying Appellants' petition for rehearing, was entered on the 11th day of September, 1967, but as yet has not been published in any official or unofficial publication. A copy of that Order is attached hereto as Appendix "A". The original Opinion written by the Supreme Court of Indiana, to which the petition for rehearing was addressed, was entered on the 8th day of June, 1967, and is reported in 226 N.E. 2d 686. This Opinion as yet has not been published in the official Indiana Reports. A copy of said Opinion is attached hereto as Appendix "B".

## JURISDICTION

This appeal is taken pursuant to 28 U.S.C., Sec. 1257(2), from a final order of the Supreme Court of Indiana affirming Marion Superior Court, Room No. 4, which decision, inter alia, sustained the validity of the Acts of 1947, Chapter 20, of the General Assembly of Indiana, which Act authorizes the State of Indiana by its deed to convey to the Civil City of Indianapolis the title to previously dedicated public market land "as sole and entire owner thereof in fee simple absolute, free and clear of any restrictions whatsoever," and erroneously quiet title to said land in the City of Indianapolis. As so construed by the Supreme Court of Indiana, said Act is in violation of the Constitution of the United States, Article

1, Section 10, which prohibits the states from impairing the obligation of contracts.

The Opinion of the Supreme Court of Indiana was issued on the 8th day of June, 1967. On the 28th day of June, 1967, this Appellant filed a petition for rehearing pursuant to Rule 2-22 of the Rules of the Supreme Court of Indiana. On September 11, 1967, this petition was denied without opinion.

The notice of appeal was filed in the Supreme Court of Indiana on the 30th day of November, 1967. The jurisdiction of this Court to review the judgment of the Supreme Court of Indiana on direct appeal is conferred by 28 U.S.C., Sec. 1257(2) and is sustained by the following decisions:

**Central R. Co. of Pa. v. Com. of Pa. Pa. 1962, 370 U.S. 607, 82 Sup. Ct. 1297, 8 L.Ed.2d 720;**

**Marcus v. Search Warrant of Property at 104 East Tenth Street, Kansas City, Missouri, Mo. 1960, 367 U.S. 717, 81 Sup. Ct. 1708, 6 L.Ed.2d 1127;**

**J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S. Ct. 913;**

*International Harvester Co. v. Department of Treasury,* 322 U.S. 340, 64 S. Ct. 1019, 322 U.S. 349, 64 S. Ct. 1030;

*Freeman v. Hewit,* 329 U.S. 249, 67 S. Ct. 274;

*Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434, 59 S. Ct. 325;

*Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 42 S. Ct. 106.

## STATUTES INVOLVED

For historic purposes, the preamble of the 1947 Act recites the content of the 1821 Act, which established the original dedication of the land in question as a public market. Chapter 20, Acts 1947, General Assembly of the State of Indiana, with its preamble, reads as follows:

"CHAPTER 20.

"AN ACT authorizing and directing the Governor to transfer and convey to the Civil City of Indianapolis certain real estate known as 'Market Square' and on which the city market of Indianapolis is situated; prescribing the manner and method of affecting such transfer and conveyance and declaring an emergency.
(S. 9. Approved February 24, 1947.)

"WHEREAS, Lots four (4) and nine (9) inclusive in the south half of Square forty-three (43) as laid out and numbered in the original survey of the City of Indianapolis, made in 1821 and approved by the Legislature on November 28, 1821 (Acts of 1821-2, p. 18, Indiana General Assembly) was marked 'Market Square' and dedicated by the State of Indiana as a public market place; and

"WHEREAS, the City of Indianapolis has thus had possession of said land for more than 125 years, has constructed and now maintains a public city market on such lots, including a strip of land five (5) feet wide off the East side of North Delaware Street between the North property line of East Market Street and the South property line of East Wabash Street; and

"WHEREAS, the legal title to said lots in said Square forth-three (43) and said five (5) foot strip of ground should in equity be vested in the city of Indianapolis; and

"WHEREAS, it is necessary that the title to said lots in said Square forty-three (43) and said strip of land be quieted and finally determined; THEREFORE,

"Be it enacted by the General Assembly of the State of Indiana:

"SECTION 1. That the Governor of Indiana is hereby authorized to recognize the right of the city of Indianapolis to the legal title to certain hereinafter described real estate acquired by undisputed possession and use thereof for more than 125 years, which said real estate is described as follows:

"Beginning at a point, said point being the intersection of the south property line of East Wabash Street, and the west property line of North Alabama Street, as presently established in the City of Indianapolis, Marion County, Indiana; thence south on and along the west property line of North Alabama Street a distance of one hundred ninety-five (195) feet, more or less, to the north property line of East Market Street; thence west on and along the north property line of East Market Street a distance of four hundred twenty-five (425) feet, more or less, to the present east property line of North Delaware Street; thence north on and along the present east property line of North Delaware Street a distance of one hundred ninety-five (195) feet, more or less, to the south property line of East Wabash Street; thence on and along the south property line of East Wabash Street a distance of four hundred twenty-five (425) feet, more or less, to the point of beginning; the aforedescribed property being principally in the south half of Square 43, as laid out and numbered in the original survey of the City of Indianapolis made in 1821 and approved in an Act approved November 28, 1821 (Acts 1821-2 page 18, Indiana General Assembly), and comprising lots 4 to 9 inclusive, in said Square

43, together with a strip of land five (5) feet wide vacated by Declaratory Resolution No. 6989 off the east side of the originally dedicated 90-foot width of North Delaware Street between the North property line of East Market Street and the south property line of East Wabash Street, as recorded February 23, 1913, in Town Lot Record No. 506, page 538, in the office of the Recorder of Marion County, Indiana; the aforementioned south half of Square 43 having been marked 'Market Square' on a map of an official survey of Indianapolis entitled 'Map of Indianapolis and Its Environs', filed by E. Sharpe, Agent, July 5, 1831, in the office of the Recorder of Marion County, Indiana; the aforedescribed property lying within Section 1, Township 15, North, Range 3 East.

"SEC. 2. Immediately upon the taking effect of this Act the Governor shall direct the Auditor of State to cause to be prepared and executed a deed of conveyance to the Civil City of Indianapolis, Indiana, transferring and conveying all right, title and interest which the State of Indiana may have in said real estate, which deed shall be signed by the Governor, and shall be officially executed by the Auditor of State and the seal of the State of Indiana affixed thereto.

"SEC. 3. Upon the execution of such deed as provided in Section 2 of this Act, the State of Indiana relinquishes forever all claims whatsoever to said real estate so conveyed to the Civil City of Indianapolis.

"SEC. 4. Whereas an emergency exists for the immediate taking effect of this Act, the same shall be in full force and effect from and after its passage."

By sustaining the validity of the 1947 Act, the Supreme Court of Indiana held in effect that Article 1, Section 10 of the Constitution of the United States did not prohibit the State of Indiana from offering for sale, changing or otherwise diverting the particular use for which the property was dedicated.

## QUESTIONS PRESENTED

As shown by the Acts previously cited, the State of Indiana had created an irrevocable and perpetual easement in certain land in Indianapolis for the use of the people as a public market. Then subsequently, in 1947, the Legislature purported to in fact revoke that easement and empower the City of Indianapolis to sell, change or otherwise alienate the heretofore dedicated land. This the people of Indianapolis attempted to prevent by the filing of their action for prohibition and mandate in the trial court herein, and they asked that the City of Indianapolis be prohibited from discontinuing the use of the land as a public market and be mandated to rebuild a certain portion of a building which had heretofore been demolished by the City of Indianapolis.

The trial court denied the relief to the citizens of Indianapolis, whereupon an appeal was taken to the Supreme Court of Indiana. The Supreme Court of Indiana, in sustaining the trial court, erred in the following respects:

(a) The Supreme Court of Indiana erred in sustaining the validity of the Acts of 1947, Chapter 20, of the General Assembly of the State of Indiana which purported to authorize the State of Indiana, by its deed, to convey to the Civil City of Indianapolis the title to previously

dedicated public market land, to use the language of the Court, "as the sole and entire owner thereof in fee simple absolute, free and clear of any restrictions whatsoever," and erroneously quieting title to said land in the City of Indianapolis, in violation of Article 1, Section 10 of the Constitution of the United States, which denies to the States the power to pass any law or take any action which would impair the obligation of contracts; the specific obligation in this case being a contractual easement, irrevocable in extent, constituting an interest and right in land, running with and encumbering it, which was exclusively created in and for the Indianapolis general public for that public's exclusive use as a city market established and continuously used for that purpose since 1832.

(b) The Supreme Court of Indiana erred in holding that the irrevocable character of a completed dedication of land applies only to individual owners and not to donations by a public authority such as a city, county or state in contravention of Article 1, Section 10 of the Constitution of the United States.

(c) The Supreme Court of Indiana erred in holding that the City of Indianapolis may alter, change, or otherwise defeat the particular use for which the property was dedicated in clear violation of Art. 1, Sec. 10 of the Constitution of the United States which denies to the states the power to pass any law or take any action which would impair the obligation of contracts.

## STATEMENT OF THE CASE

The plaintiffs in the nisi prius court and as the appellants in the Indiana Supreme Court and in this Court, maintained this cause in their capacities as members of

the general public of the City of Indianapolis and as taxpayers therein, as a class action in the Superior Court of Marion County, Room No. 4, commencing said action on the 26th day of November, 1957. The complaint filed sought an injunction against the City of Indianapolis and its officials to enjoin the city's publicly announced plan to evict all stand holders in the market house, to raze the same, and divert all of the market grounds to use as a public metered parking lot.

The complaint also asked that the City be mandated to restore a part of the market building which had previously been razed on the portion of the market site, and which land was then and is now being used as a metered parking lot. Immediately upon the initial dedication of the land as a public market by the State of Indiana in 1821, the people of Indianapolis accepted the dedication by placing a public market on the grounds, and continued through the years to use this ground as a public market without interruption, making capital improvements thereon from time to time as progress would dictate.

Only once during the long and continuous use of this land as a public market has there been any serious challenge to the nature of the dedication. In 1859, the Supreme Court of Indiana was required to pass upon the nature and validity of this dedication and in so doing held that the land so dedicated could not be sold on an execution against the City of Indianapolis, and further held that the corporate authorities of the City of Indianapolis had "no right to dispose of it by sale, or otherwise use it in a way different from the object for which it was granted."

*Ketcham v. City of Indianapolis* (1859), 12 Ind. 620, 624.

From the time of the Ketcham Case until the passage of the 1947 Act, no one in Indianapolis, or in the State of Indiana, for that matter, had attempted to destroy or in any way challenge or change the use of the storied market place.

## HOW THE FEDERAL QUESTION AROSE

Following the passage of the 1947 Act, the City of Indianapolis, through its duly elected and appointed officials, publicly announced that it would raze the existing structures on the dedicated market land, would discontinue the use of said land as a market and would establish a public metered parking lot on said ground.

The persistence in this position ultimately led to the filing of the complaint in the trial court above referred to. This complaint challenged the validity of the 1947 statute as being repugnant to Article 1, Section 10 of the Constitution of the United States.

Upon the adverse decision by the trial court, the appellants filed their motion to vacate the trial court's judgment, wherein, among many other things, it was specifically stated:

> "* * *; and also vested in the local general public an irrevocable easement in such land for exclusive uses as a public market and thereby created for such public contractual rights and an interest in such land that cannot be impaired by any law whatever enacted by the General Assembly of Indiana, as so prohibited by the Constitutions of the State of Indiana, Art. 1, Sec. 24, and of the United States, Art. 1, Sec. 10, Cl. 1, and as so applying to the Act of 1947, Chapter 20; and to the deed authorized thereby, and here in issue; or as authorizing any impairment,

change, or diversion of the irrevocable dedication of this market land and its exclusive uses for such public easement therein, as aforesaid." (Tr., p. 918, ll. 13-25)

Upon the appeal to the Supreme Court of Indiana, the appellants filed their assignment of errors in said Court, wherein it was specifically stated:

"* * *said Act, and also said deed would be wholly void, under the Constitution of the State of Indiana, Art. 1, Sec. 24, and the Constitution of the United States, Art. 1, Sec. 10, as thereby impairing the obligations of the contractual easement, interest and rights in said land, running with and encumbering it, which were created by implication of law, and that exclusively vested in the local general public for its exclusive market uses, as so accepted and effective continuously since 1832; thereby completing the irrevocable dedication by the State of Indiana to the local general public of such vested easement in said public market land and uses thereof, and which imposed upon the prior title in fee simple of the State of Indiana a reversionary restriction and limitation, as a possibility of reverter, and which contractual easement, the General Assembly could not so impair and the court below could not so ignore, as such Act has been here so construed." (Tr. p. XXIV, l. 19-p. XXV, l. 3)

The decision of the Supreme Court of Indiana is attached hereto as Appendix "B". An examination of this Opinion, including the dissenting Opinion, demonstrates that the United States Constitutional question which was presented by the pleadings as above set out, remained an issue which was required to be and was in fact decided by the Supreme Court of Indiana, despite its ineluctable omission and failure to so state.

## THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The Federal Question presented by this case was first raised in the United States by the celebrated Dartmouth College Case, wherein it was stated:

"We are not led to the consideration of the first question in the cause: whether this charter is a contract, within the clause of the constitution prohibiting the States from passing any law impairing the obligation of contracts. In the case of *Fletcher v. Peck*, 6 C. 87, 136, this court laid down its exposition of the word "contract," in this clause, in the following: 'A contract is a compact between two or more persons, and is either executory or executed. An executory contract, is one in which a party binds himself to do or not to do a particular thing. A contract executed, is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. *A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is always estopped by his own grant.' This language is perfectly unambiguous, and was used in reference to a grant of land by the governor of a State under a legislative act. It determines, in the most unequivocal manner, that the grant of a State is a contract within the clause of* (p. 683) *the constitution now in question, and that it implies a contract not to reassume the rights granted.* A fortiori, the doctrine applies to a charter or grant from the king.

"But it is objected, that the charter of Dartmouth College is not a contract contemplated by the constitution, because no valuable consideration passed to the king as an equivalent for the grant, it purporting to be granted ex mero motu; and further, that no contracts merely voluntary are within the prohibi-

tory clause. It must be admitted, that mere executory contracts cannot be enforced at law, unless there be a valuable consideration to sustain them; and the constitution certainly did not mean to create any new obligations, or give any new efficiency to nude pacts. But it must, on the other hand, be also admitted, that the constitution did intend to preserve all the obligatory force of contracts, which they have by the general principles of law. Now, when a contract has once passed, bona fide, into grant, neither the king nor any private person, who may be a grantor, can recall the grant of the property, although the conveyance may have been purely voluntary. *A gift, completely executed, is irrevocable.* The property conveyed by it becomes, as against the donor, the absolute property of the donee; and no subsequent change of intention of the donor can change the rights of the donee: 2 Bl. Com. 441; Jenk. Cent. 104. *And a gift of the crown of incorporeal hereditaments,* such as corporate franchises, when executed, comes completely (p. 684) within the principle, and is, in the strictest sense of the terms, a *grant;* 2 Bl. Com. 317, 346; Shep. Touch. c. 12 p. 228. *Was it ever imagined that land, voluntarily granted to any person by a State, was liable to be resumed at its own good pleasure?* Such a pretention would, under any circumstances, be truly alarming; but in a country like our, where *thousands of land titles had their origin in gratuitous grants of the States,* it would go far to shake the foundations of the best settled estates. And a grant of franchise is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation, when the grant was complete, and accepted by the grantees, it involved a contract that the grantees should hold, and the grantor should not resume the grant, as much as if it had been founded on the most valuable consideration.

"But it is not admitted that this charter was not granted for what the law deems a valuable consideration. For this purpose, it matters not how trifling the consideration may be; a pepper-corn is as good as a thousand dollars. Nor is it necessary that the consideration should be a benefit to the grantor. It is sufficient if it import damage or loss, or forebearance of benefit, or any act done, or to be done, on the part of the grantee. It is unnecessary to state cases; they are familiar to the mind of every lawyer; Pillans v. Van Mierop, per Yates, J., 3 Burr. 1663; Forth v. Staunton, 1 Saund. Rep. 211; Williams's note 2, and the cases there cited." (Emphasis added)

*Trustees of Dartmouth College v. Woodward* (1819), 4 Wheaton (US), 518, on pp. 682, 684, etc., 4 Law Ed. (US) 269; concurring opinion of Justice Story.

We respectfully contend that the above quoted language from the Dartmouth College Case is clearly applicable to the case at bar, and that the time-honored doctrine set out in and constantly followed since the Dartmouth College Case should here once again be applied to prevent a thwarting of the United States Constitution to the jeopardy of the citizens of the City of Indianapolis.

While we think the Dartmouth College Case standing by itself is decisive of the question presented in this appeal, it may be helpful to examine the majority and dissenting opinions of the Supreme Court of Indiana in the light of the Federal questions here presented.

Under the heading "QUESTIONS PRESENTED", supra, we set forth three specific errors of the Supreme Court of Indiana related to federal and not state questions. The first error asserted that Article 1, Section 10, of the Constitution of the United States effectively pre-

vented the State, through the machinery of the 1947 Act, to run out on its obligation and to recall its former grant of land for a market place to the people of Indianapolis. In the second error, we suggested that the Supreme Court of Indiana erred in holding that the irrevocable character of a completed dedication of land applies only to individual owners and not to donations by a public authority such as a city, county, state or crown. And the third error cited consisted in holding that this State could alter or change or defeat the use of the property previously dedicated.

In a broad sense, the three errors which we accuse the Supreme Court of Indiana of having committed are not separate charges, but rather, different expressions of one fatal error, namely, the refusal to apply properly the provisions of Article 1, Sec. 10 of the Constitution of the United States. The majority opinion skirts this same decisive issue by failing to refer to it. It skirts the issue by talking about other rather tangential issues such as trusteeship, obiter in the Ketcham case, which we will discuss, and a perfectly astounding statement that the doctrine of an irrevocable trust applies only to lands dedicated by a private individual and does not apply to lands dedicated by a governmental body. This is simply not a true statement of the law as it exists in the United States today. Apart from the Dartmouth College Case and the earlier decision of *Fletcher v. Peck* 6 Cranch 10 U.S. 87, 3 L.Ed. 162, which would seem to be ample authority, it is sufficient to show that those decisions are reflected in the law as it stands today. We call attention to the modern statement in 23 Am. Jur. 2d, Dedication, Sec. 65, p. 56, as follows:

> "A state or municipality holds dedicated property, not in a proprietary, but in a sovereign or corporate, capacity in trust for the use to which it was dedi-

cated. Though much must be left to the discretion of the legislative body as to the best manner of regulating that use, its power of control over such property must be exercised in conformity with the purpose of the dedication. It cannot destroy the trust created by a dedication of land to a specific, limited, and definite public use, or divert the property to any other purpose inconsistent with the particular use to which it was dedicated."

The dissenting opinion of the Supreme Court of Indiana, on the other hand, correctly concludes that there is a perpetual dedication for the use as a market place and that there has been no abandonment of such a use, and that the most that could be said of any of the provisions of the 1947 Act was that it permitted the State of Indiana to give a quit-claim deed, and that actually the only interest the State of Indiana could have in the subject real estate at the time of the attempted conveyance is a speculative, contingent and reversionary interest predicated upon an abandonment by the public of the use of that real estate for a market place. It is an ironic historical note that the Supreme Court of Indiana, faced with almost the identical problem in 1859, came to a correct conclusion, and we quote from the outstanding parts of that opinion:

"* * * a market-space, and was not therefore subject to sale on execution; * * *

* * * * *

"Indeed, the City of Indianapolis never had any title to the 'half of square No. 48' save that which is founded on the Act of 1857; and when it is noted that that act defines the purpose for which the square in question should be granted, it cannot be assumed that she ever held it for any purpose other than that defined in the act.

* * * *

"It follows that the 'half of square 48' was granted for a public use, viz. 'a market space' and was accepted for that use and no other.

* * * *

" * * * the corporate authorities would have no right to dispose of it by sale, or otherwise use it in any way different from the object for which it was granted.

* * * *

"The Corporation of Indianapolis is, in respect of the half square in question, *a mere trustee*, holding it for a special public use." (Our emphasis)

*Ketcham v. City of Indianapolis* (1859), 12 Ind. 620.

The Ketcham Case is not only in point, it is not only on all fours, it is actually the same case as is presented here, and we call attention to this former decision of the Supreme Court of Indiana, made more than a century ago, in order to show that the present Supreme Court of Indiana was bluntly and forcibly informed of the existence of the Federal question, and no amount of rhetorical evasion and judicial sleight-of-hand can prevent them from having actually decided the Federal question in terms of their mandate.

While there was some evidence in the trial below, the facts were largely stipulated, and are not in dispute. And, even in the case of failure to provide official records because they were burned, early historical accounts were placed in the record showing the use of the city market and the fact that it has never been abandoned, and the accuracy of these historical accounts has not been challenged. In candor, it would appear that the Supreme Court of Indiana has decided constitutional issues without referring to them. Nevertheless, all that properly can be required of a court, and what ultimately must be done in

this Court, is the application to stipulated facts of a proper constitutional rule, and this not only lies within the power of this Court, but is the very essence of its function. (28 U.S.C. Sec. 2104, Sec. 2106)

## CONCLUSION

Although we have asserted and discussed several errors in the Opinion of the Supreme Court of Indiana, there is only one really principal question in this case, and it is relied upon as a substantial Federal matter. It is, namely, that the Acts of the Indiana General Assembly of 1947, Chapter 20, are invalid when tested under the stipulated facts of this case, and the proper application of Article 1, Section 10 of the Constitution of the United States, which denies to the states the power to pass any law or take any action which impairs the power of contracts.

We respectfully suggest that this Court may find this case an appropriate one for plenary consideration, with briefs and oral argument as an aid in the proper resolution of the question it presents.

Respectfully submitted,

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## APPENDIX A

STATE OF INDIANA
CLERK OF SUPREME AND APPELLATE COURTS

Kendal E. Mathews, Clerk
217 State House

PAUL C. WETTER, ET AL

VS

CITY OF INDIANAPOLIS, INDIANA, ET AL

No. 30455

You are hereby notified that the SUPREME Court has on this day Denied Appellant's Petition for Rehearing.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 11th day of September 1967.

Kendal E. Mathews

Clerk Supreme and Appellate Courts

## APPENDIX B

JOHN J. DILLON,
Attorney General of Indiana,

EDWIN K. STEERS,
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# IN THE

# SUPREME COURT OF INDIANA

No. 30455

Filed Jun 8 1967

Kendal E. Mathews, Clerk

PAUL C. WETTER, ALBERT STEFFEY, PETER A. CORSARO, DOROTHY POYNTER, VIRGINIA JAMES, suing herein as Taxpayers of the City of Indianapolis, Indiana, and as inhabitants and members of the general public herein affected; and also as class representatives of all other such persons similarly situated and affected herein; and

EDWIN K. STEERS, as Attorney General of the State of Indiana,

*Appellants,*

vs.

CITY OF INDIANAPOLIS, INDIANA, a municipal corporation;

PHILLIP L. BAYT, as its mayor;

CHARLES H. BOSWELL, as its city controller;

DAVID M. SILVER, WILLIAM H. WARREN, and SHIRLEY D. MURPHY, as the Commissioners constituting its Board of Public Safety;

JACOB L. STEINMETZ, as the Superintendent of the City Market;

RUSSELL J. DEAN, HUGH G. BAKER, ROBERT H. SCHREIBER, AUGUST SEILOFF, as its Board of Public Works;

CHRISTIAN J. EMHARDT, JOSEPH E. BRIGHT, CHARLES W. APPLEGATE, MARY M. FRANCIS, R. THOMAS McGILL, GLADYS PHOLMAN, ROSCOE A. McKINNEY, JOSEPH C. WALLACE, WILLIAM H. WILLIAMSON, Comprising the Common Council of said City;

LUTHER J. SHIRLEY, DONALD JAMESON, WALTER J. DEAN, ALBERT O. DELUSE, BRUCE C. SAVAGE, as its Off-Street Parking Commission;

DARRELL C. WALTON, City Civil Engineer;

KENNETH K. WARK, its Commissioner of Buildings;

ALBERT H. LOSCHE, City Purchasing Agent;

And all other officers, employees and agents, acting herein for, or in behalf of said City, or of any of said co-defendants; and all successors to any thereof,

*Appellees.*

**APPEAL FROM MARION SUPERIOR COURT, ROOM NO. 4 HON. ROBERT G. ROBB, SPECIAL JUDGE**

ARTERBURN, Judge.

The plaintiffs-appellants, as taxpayers and members of the general public, brought this class action in 1957 against the City of Indianapolis, et al., the appellees, to enjoin the city from utilizing certain real estate in the City of Indianapolis known as the East Market site for any purpose other than a city market, to mandate the city to budget and levy taxes, to maintain the real estate and improvements known as the "City Market"; and to rebuild Tomlinson Hall on part of the site. In 1958 Tomlinson Hall was partially destroyed by fire, causing a vacation of a large part of the market space on its ground floor. The city proposes to use the site to construct a public garage for off-street parking.

In 1958 a temporary injunction previously granted the plaintiffs was dissolved, and a final decree and judgment on behalf of the city was entered, denying the relief prayed for. From this judgment the taxpayers appeal. The appeal went first to the Appellate Court. However, under the Acts of 1967, ch. 357, this appeal was transferred on April 24, 1967 to this Court. See also: *Weiler v. City of Indianapolis* (1966), —— Ind. ——, 219 N.E.2d 911.

The land involved is the South Half of Square 48 located between the boundaries of Delaware, Market, Alabama and Wabash Streets in the City of Indianapolis. There now exists a market open to the public on this site which has been maintained as a public market by the City of Indianapolis from prior to 1833 to the present time.

At first the site was an open-air market, and later buildings built by public subscriptions, with the general funds of the City of Indianapolis, and by gift housed the market site. Among other buildings on this one-half block was Tomlinson Hall which was built partially with contributed funds. The upper two stories of Tomlinson Hall were used as a meeting hall, for the presentation of shows, dances, and other public events, while only the first floor was used for market purposes. As related previously, Tomlinson Hall was destroyed by fire in January, 1958.

The title to the tract in particular and to the area now occupied by the City of Indianapolis was ceded to the United States by Indians in a treaty of St. Mary's, Ohio. By virtue of an Act of Congress approved March 3, 1819 and an Act of the Indiana General Assembly approved January 11, 1820, commissioners were appointed to select land as a permanent site of government of the State of Indiana. The commissioners were authorized to lay out and plat one section of land of one square mile as the initial site of a town to be called Indianapolis, which original plat, as finally prepared, was approved by an act of the General Assembly on January 6, 1821. The site was bounded by North, East, South and West Streets. The plat was filed in the Secretary of State's office in June, 1821. This plat is made an exhibit in this case, and we find thereon the South Half of Lot or Square 43 designated "Market" and subsequent plats thereafter as "Market Square", "City Market". We also find on the plat a site in the middle of what is known as Circle Street marked "Governor's Circle" which is now occupied by the Soldiers and Sailors Monument, a spot marked "Court House" which is now occupied by the City-County Building, a place marked "University Square" which is now used as a

park. We also find on the plat the South Half of Square 50 marked "Market" which is also known as "West Market Square", to distinguish it from the Market Square with which we are here concerned, which is also known as "East Market Square". With reference to the latter site (West Market Square, South Half of Square 50), we are informed by the briefs that this was never used as a market site and in 1837 was taken over for the new Central Canal, which is still located there. We are also informed that this West Market Square site was exchanged with the State of Indiana for the North Half of Square 48, and the State in the deed referred to it as "a market space". This market space or market site was used for a short time as a second market on the west side and later was taken over again by the State of Indiana, and is part of the ground upon which the State Capitol is now located and is the ground referred to in what is known as the *Ketcham Case* [*The President, &c., v. The City of Indianapolis* (1859), 12 Ind. 620], of which case we shall have more to say later in this opinion.

It will be noted, therefore, as a historical fact, that there have been various sites and tracts of land within the City of Indianapolis that have been designated by the State of Indiana through deeds or plats for certain public purposes at the time and which, through the years, have been changed and altered as to their public use.

The appellants stress heavily the fact that the legislature, by the Act of 1947, ch. 20, authorized the deeding of all interest of the State in the Market Square in controversy here to the City of Indianapolis, and in the preamble of the Act it recites:

> "Whereas, Lots four (4) and nine (9) inclusive in the south half of Square forty-three (43), as laid out

and numbered in the original survey of the City of Indianapolis, made in 1821 and approved by the Legislature on November 28, 1821, (Acts of 1821-2, p. 18, Indiana General Assembly), was marked 'Market Square' and dedicated by the State of Indiana as a public market place."

The appellant's contention is summed up by the following statement:

> "Thus, the State of Indiana, by such official plat of 1821, as duly legalized, offered to dedicate the land here in issue for use as a public east market, if and when it should be accepted and used by, or for, the general public; thereby completing the *irrevocable dedication* of such land, and creating the public easement, as such interest in said land, that would so vest in the general public, as the beneficiaries of such donation, whenever such use of the land as a public market was begun and so long as so continued by the public.
>
> • • • • •
>
> "Such acceptance and use of such donated land completed the irrevocable dedication thereof for such exclusive market use." (Our italics)

The appellants rely to a large extent on cases and quotations setting up charitable trusts by private individuals who donate their private property to some public agency for that purpose. We do not feel these cases are analogous to the present situation. Here the property in question was owned originally by the public and simply donated for a public use without the words "irrevocably" or "in perpetuity" being used. There is no semblance of the creation of a trust in the mere transfer of property by a state to one of its agencies for some public use. The designation by the state or one of its instrumentalities of any particular property for a public or governmental use does not create contractual rights in the public to in-

sist upon such use being made "irrevocable" and "in perpetuity". Under the principles advocated by the appellants in this case a state or its governmental agency would put itself in a straight jacket and tie its hands in the use of such public property as it may possess for all future purposes, regardless of changing times. Such a principle would violate sound public policy.

Appellants emphasize the word "dedicated". It does not, in our judgment, have by necessary implication the legal significance of "irrevocable" and "in perpetuity". Generally speaking, we "dedicate" a bridge, park, public auditorium or other governmental works to the purpose for which they were constructed. Yet this does not mean that they are placed irrevocably and in perpetuity to such purpose and use and that the state has lost control thereafter to alter such use as time and change require. 1 Bogert, *Trusts and Trustees*, § 34, p. 271 supports this position.

In *Reichelderfer v. Quinn* (1932), 287 U.S. 315, 53 S.Ct. 177, 77 L.Ed. 331, the Supreme Court of the United States said with reference to land acquired for park purposes by an Act of Congress which was later used in part for other purposes:

> "It has often been decided that when lands are acquired by a governmental body in fee and dedicated by statute to a park purpose, it is within the legislative power to change the use.
>
> • • • • • •
>
> "Thus construed, the dedication of the park, a declaration of a present purpose; does not imply a promise to neighboring land-owners that the park would be continued in perpetuity."

Governmental bodies hold all property in which the public is interested, such as streets, alleys, public squares,

commons, parks, and wharves for the use of the public generally. No one could logically contend that such governmental bodies do not have the right to vacate and change or alter this public property as such governmental bodies see fit in the public interest.

In *McDonald v. Board of Street Com'rs of City of Boston* (1929), 268 Mass. 288, 167 N.E. 417, land was conveyed to the city and the deed provided that a public street was to be built on it. Thereafter the city sought to discontinue the street, vacate it, and sell the land. An action was brought on the theory of a public trust to prevent such sale. The court stated:

> "There are no words to the effect that the conveyance is upon a perpetual trust. If a trust had been intended, words indicative of that design reasonably might be expected in a conveyance affecting valuable real estate in Boston so recently as 1879. While no particular words are necessary to the creation of a trust, some words in connection with attendant factors must point to a trust or none is established."

The laws of Indiana have long recognized the authority of a city to determine the proper use of its public property. The Cities and Towns Act, Ch. 129, Acts 1905, contains the following provision which is still in force and which empowers the City of Indianapolis:

> "To lay out, open, *change*, vacate and to fix or change the grade of any street, alley or *public place* within such city, and to design, order, contract for and execute the improvement or repair of any street, alley, wharf or public place within such city." (Emphasis added)
>
> Burns' Ind. Stat. Anno. §48-1902 (1963 Repl.)

> "To authorize the alienation and conveyance of any property, real or personal, belonging to such City,

whether used for public and governmental or for private purposes:..."

Burns' Ind. Stat. Anno. §48-1407 (1963 Repl.)

The appellants seek to avoid this well recognized principle applicable to streets, highways, parks, and like property by the contention that changing methods of transportation and traffic require widening, vacating, and changing the routes of highways. We can see no difference in the present situation except one of degree as to other public property which may be subject to changing times and modes of living.

Finally, the appellants contend that the *Ketcham Case* [*The President, &c., v. The City of Indianapolis* (1859), 12 Ind. 620] is decisive of the question here presented. This case concerned the West Market site, as distinguished from the East Market site with which we are here concerned. The West Market site was acquired by the City of Indianapolis by exchanging the South Half of Square 50 (which was designated as a market site on the original plat of Indianapolis), for the North Half of Square 48 (which is now part of the State Capitol grounds). This latter tract of land (North Half of Square 48) was levied on by Ketcham as a result of the judgment against the city and sold on execution. This Court held the sheriff's sale was a nullity, and the Market site was not subject to sale on execution because it "was dedicated by the State to a public use, namely a market space". However, we find what is said in that opinion additionally as to the City of Indianapolis being "a trustee" of this property, and the City of Indianapolis has no right to dispose of it "by sale or otherwise", is dicta in that opinion and unnecessary to the decision. It was a well settled principle of law at that time and has been through-

out the history of the State of Indiana that public property held by a governmental body is not subject to execution, regardless of whether or not it be "dedicated" or held in "trust". The mere fact alone that property is held by the state or a municipal corporation makes it immune from ordinary execution and sale.

13 I.L.E., Execution, Sec. 3, p. 220.

It is said in *Lowe v. Board of Commissioners of Howard County* (1884), 94 Ind. 553, that:

> "The general rule is that property of a public corporation held for public or governmental purposes cannot be sold under any legal process. Property of this description cannot be sold on execution."

In that case it was sought to levy upon a "public square" for a judgment against the county. It is interesting to note following the quotation above, the *Ketcham Case, supra,* is immediately cited on this limited proposition. Again in *School Town of Windfall City v. Somerville* (1914), 181 Ind. 463, 473, 104 N.E. 859, 863, it is stated:

> "It is well settled that property in use for public or governmental purposes cannot be sold on execution or other legal process."

Thereafter follows the citation again of the *Ketcham Case* on this principle alone.

It is our judgment and opinion that the *Ketcham Case* is authority for no more than what is quoted above. The opinion in that case was needlessly expanded in language to cover matters not then in issue. The statements therein in excess of the principle stated above are pure dicta and not a precedent by which we ought to be bound.

Finally, we may not overlook the consequences of appellant's position and theory were it accepted, namely, such a position would place any governmental body or city in a legal straight jacket as to most of the property which it held. Once "dedicated" or named for a particular use, the use could not thereafter be altered or changed, as circumstances and times might require. It would create difficulties rather than eliminate them for us to add to the word "dedicated" the implied meaning of "irrevocable" and "in perpetuity", as urged by the appellants.

The position we take in this opinion is that which we think has been followed historically in practice in this State with reference to all the other property similarly designated on the original map or plat of the City of Indianapolis, whereon are designated "Governor's Circle", "Market" (South Half of Square 50 and North Half of Square 48), "Court House", "University Square" and "State House".

The State Capitol is now located on an extension of Market Street, which was "dedicated" as a street in the original plat, as well as on part of a site conveyed to the City of Indianapolis as a "Market".

We have already mentioned how the "Governor's Circle" is now occupied by the Soldiers and Sailors Monument; "Court House Square" is now occupied by a City-County Building; "University Square" by a park; and the South Half of Square 50 designated as "Market" is an old canal. The history of this state has defined the principle of law which we announce in this case.

The judgment of the trial court is affirmed.

HUNTER, C.J. and MOTE, J. CONCUR.

JACKSON, J. DISSENTS WITH OPINION.

IN THE

SUPREME COURT OF INDIANA

No. 30455

Filed Jun 8 1967

Kendal E. Mathews, Clerk

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And all other officers, employees and agents, acting herein for, or in behalf of said City, or of any of said co-defendants; and all successors to any thereof,

*Appellees.*

## DISSENT

JACKSON, J.

I am unable to agree with the majority opinion herein and therefore dissent thereto.

For the purpose of this dissent I deem it sufficient to say that there has been no abandonment of the use of the "Market"; "Market Square", or "City Market" being the South half of Square 43 located between the boundaries of Delaware, Market, Alabama and Wabash Streets in the City of Indianapolis, Marion County, Indiana. The land in question was dedicated for use by the public as a market place and is so used today. The only portion of such dedicated land not now so used is that portion thereof formerly covered by Tomlinson Hall. Tomlinson Hall was destroyed by fire. Subsequently the city razed the remains of that building and by its unilateral act caused that portion of the market lot to be used for parking purposes.

The trial court, at the request of the parties hereto, made a special finding of facts in this cause. Finding No. 8 thereof reads as follows, to-wit:

> "8. Pursuant to Chapter 20 of the Acts of 1947 a deed of the tract here involved was executed by Henry F. Schricker as Governor of Indiana and James M. Propst, Auditor of the State of Indiana and recorded in the Office of the Recorder of Marion County in Town Lot Record 1409, page 293, which deed was dated November 15, 1950, and is in the form of Plaintiff's Exhibit 10 and is incorporated herein by reference. By such deed the State of Indiana conveyed all right, title and interest of the State of Indiana to the tract here involved to the Civil City of Indianapolis."

The deed from the State of Indiana purporting to convey the market lot (S 1/2 of Square 43) to the City of Indianapolis is a Quit Claim Deed conveying only any interest the State of Indiana then had in such real estate.

It seems clear to the writer that the only interest the State of Indiana could have had in the subject real estate, at the time of the attempted conveyance above mentioned, or for that matter even now, is a speculative and contingent future interest predicated on an abandonment by the public of the use of that real estate for a market place.

It seems equally clear, that at the time the city (then town) was platted and the south half of square 43 dedicated to the use of the public for a market place, the city (then town) of Indianapolis was placed in possession of such land for the purpose of maintaining a market place thereon. That so long as there is a demand for such use and so long as the public will use such real estate for that purpose, the City of Indianapolis is required to make such use thereof. Until there is no longer any demand by the public for the use of such real estate there can be no diminution of the use, or abandonment, of said real estate by either the City or State and certainly there can be no vesting of any reversionary, or other, interest of the State therein. Therefore, the State of Indiana had no interest to convey in the subject real estate at the time of the execution of the deed to the City of Indianapolis.

The judgment of the trial court should be reversed and the cause remanded with instructions to grant appellants' Motion for a New Trial.